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United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–03–50 OF 1996
NH CHAN, ABU MANSOR AND AHMAD FAIRUZ JJCA
10 FEBRUARY 2001

Bankruptcy *— Notice — Application to set aside — Whether amount of interest claimed excessive — Whether amount stated in notice included a sum which is time barred — Limitation Act 1953 s 6(3)*

Civil Procedure *— Appeal — Notice of — Notice of appeal filed more than 14 days after the date of judgment — Whether defect a mere technicality — Whether defect fatal to the proceedings*

The judgment debtor ('the respondent') applied to strike out the bankruptcy notice on the ground that the amount of interest claimed was excessive as it included a sum which was said to be time barred under s 6(3) of the Limitation Act 1953. The Judicial Commisssioner held the bankruptcy notice was invalid. The judgment creditor ('the appellant') appealed. The appellant contended that they followed the authority of *Re Yamaha (M) Sdn Bhd* [1990] 3 MLJ 317 whereby interest claimed was from the date of judgment plus six years. The respondent contended that since the bankruptcy notice was filed out of time, no interest could be claimed at all. The respondent also raised a preliminary objection that the notice of appeal was out of time as it was filed more than 14 days after the date of judgment.

Held, dismissing the appeal:

(1) (Per **Abu Mansor JCA**) The court upheld the substantial submission of the respondent that the bankruptcy notice in this appeal had not only having included interest prior to the judgment but also the claim of interest was after the six years period barred by s 6(3) of the Limitation Act 1953. It was clear that the material words of s 6 is the judgment and the arrears of interest of judgment debt, still referring to the judgment debt (see p 564C–E).

(2) (Per **Ahmad Fairuz JCA**) The preliminary objection should not be allowed. The objection was indeed on a mere technicality. The notice of appeal had been filed anyway. Such procedural technical objection should not be allowed to obstruct the process of giving justice to the deservings by going into the substantive issues of the matters before the court (see p 566D–E).

[**Bahasa Malaysia summary**

Penghutang penghakiman ('responden tersebut') memohon ingin membatalkan notis kebankrapan tersebut atas alasan amaun faedah

yang dituntut terlampau tinggi kerana ia meliputi satu jumlah yang dikatakan dihadkan masa di bawah s 6(3) Akta Had Masa 1953. Pesuruhjaya Kehakiman memutuskan bahawa notis kebankrapan tersebut tidak sah. Pemiutang Penghakiman ('perayu tersebut') merayu. Perayu berhujah bahawa mereka mengikuti autoriti *Re Yamaha (M) Sdn Bhd* [1990] 3 MLJ 317 di mana faedah yang dituntut adalah dari tarikh penghakiman tambah enam tahun. Responden menegaskan bahawa oleh kerana notis kebankrapan tersebut difailkan di luar tempoh masa, tiada faedah dapat dituntut langsung. Responden juga membangkitkan bantahan permulaan bahawa notis rayuan tersebut berada di luar tempoh masa kerana ianya difailkan lebih daripada 14 hari selepas tarikh penghakiman.

Diputuskan, menolak rayuan tersebut:

(1) (Oleh **Abu Mansor HMR**) Mahkamah mempertahankan penghujahan substansial responden bahawa notis kebankrapan dalam rayuan ini bukan hanya melibatkan faedah sebelum penghakiman tetapi juga bahawa tuntutan faedah tersebut telah melampaui tempoh enam tahun dan dihadkan oleh s 6(3) Akta Had Masa 1953. Ia jelas bahawa perkataan material s 6 ialah penghakiman dan tunggakan faedah hutang penghakiman tersebut, masih merujuk kepada hutang penghakiman (lihat ms 564C–E).

(2) (Oleh **Ahmad Fairuz HMR**) Bantahan permulaan tersebut tidak harus dibenarkan. Bantahan tersebut hanya merupakan satu perkara teknikal. Walau apapun, notis rayuan telahpun difailkan. Bantahan aturan teknikal sebegini tidak patut dibenarkan menghalang proses menegakkan keadilan kepada mereka yang wajar mendapatnya dengan memeriksa isu-isu substantif perkara di hadapan mahkamah (lihat ms 566D–E).

Notes

For cases on bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1699–1816.

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 788–841.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Cropper v Smith (1884) 26 ChD 700 (refd)

Imtiaz Ahmad v Ghulam Ali PLD 1963 SC 382 (refd)

Malaysian Soil Investigation Sdn Bhd v EMCO Holdings Sdn Bhd [1994] 1 CLJ 267 (refd)

Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor [1975] 2 MLJ 188 (refd)

Yamaha (Malaysia) Sdn Bhd, Re [1990] 3 MLJ 317 (refd)

Legislation referred to

Bankruptcy Act 1967
Courts of Judicature Act 1964 s 42(1)
Limitation Act 1953 ss 3, 6(3)

Appeal from: Bankruptcy No D5–29–220 of 1996 (High Court, Kuala Lumpur)

Rohaine bte Mohd Shim (*Ashmadi bin Othman* with her) (*Che Mokhtar & Co*) for the appellant.

Colin Andrew Pereira (*Ong Manickam & Co*) for the respondent.

Abu Mansor JCA. : My learned brother had, in his grounds of judgment, dealt with the preliminary points raised by the respondent. I had read the judgment and I agree with him. In this grounds of judgment I shall deal with the substantive aspect of the appeal.

Cik Rohaine for the judgment creditor submitted that this appeal originated from the decision of the SAR ('SAR') to the judge in chambers. The learned SAR refused to strike out the bankruptcy notice of the judgment creditor dated 24 January 1996. The judgment debtor's ground for applying to strike out was because it was alleged that the amount of interest claimed was excessive as it included a sum, in the bankruptcy notice, which was said to be time barred under s 6(3) of the Limitation Act 1953 ('the Act'). As already stated above, the learned judicial commissioner ('JC') held that the bankruptcy notice was invalid. The appellant judgment creditor appealed.

The appellant herein contended that they followed the authority of *Re Yamaha (Malaysia) Sdn Bhd* [1990] 3 MLJ 317. On the authority of *Yamaha*, judgment was handed down on 19 May 1978. Interest was claimed up to 19 May 1984, which interest was from the date of judgment plus six years. It was held that the claim of interest was properly made.

In our present case, the appellant contended that judgment was obtained on 15 October 1987. The appellant in the bankruptcy notice is claiming interest up to 14 October 1993, a period of not later than six years, although the bankruptcy notice was filed much later on 24 January 1996. It might be they have quantified interest up to the filing of the bankruptcy notice, the appellant was actually claiming interest up to only 14 October 1993. The appellant relies substantially on this *Yamaha* case.

The respondent's judgment debtor on the other hand had asked that this appeal be dismissed with costs on the ground that the bankruptcy notice served by the appellant is bad and the respondent had disputed the sum within seven days by filing a summons in chambers thereof.

The respondent referred the court to p 37 of the appeal record where the appellant, in this case, claimed that interest was alleged to be due from 1 April 1986 on a judgment sum of RM95,864.93. The judgment was on 15 October 1987. As stated in the said bankruptcy notice the interest claimed was from 1 April 1986, a period of 18 months prior to the judgment up to 24 January 1996, when the bankruptcy notice was filed.

The respondent argued strongly that if the appellant says that the date the interest became due was 1 April 1986 as claimed by him, then the respondent submitted, if at all the appellant was entitled to claim interest, it would be clearly six years from 1 April 1986 which falls on 31 March 1992. The respondent emphasized further that if the bankruptcy notice was to be filed, interest could only be claimed up to 31 March 1992. Therefore, the respondent submitted that since the bankruptcy notice was filed out of time on 24 January 1996 no interest could be claimed at all.

In support of their argument, the respondent relied on the case of *Malaysian Soil Investigation Sdn Bhd v EMCO Holdings Sdn Bhd* [1994] 1 CLJ 267 where the claim for interest made was within the six years period, whereas in the present case under appeal, the claim of interest was made after the expiry of six years period.

After hearing and considering the submissions of both counsels, I uphold the substantial submission of the respondent's counsel that the bankruptcy notice in this appeal had as not only having included interest prior to the judgment but also the claim of interest was after the six years period and barred by s 3 of the Act. Section 6(3) of the Act provides:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

It was clear to me that the material words of s 6 of the Act is the judgment and the arrears of interest is the arrears of judgment debt, still referring to the judgment debt. That being my decision, I confirm that the JC had not erred in his decision and I dismiss this appeal with costs.

Ahmad Fairuz JCA. : This appeal was heard on 23 and 24 February 1998 and judgment was reserved. Since then, NH Chan JCA, the chairman of this court had retired and it therefore falls on the remaining two members of the panel, ie Abu Mansor JCA (now FCJ) and I, Ahmad Fairuz JCA (now FCJ) to determine this appeal by virtue of s 42(1) of the Courts of Judicature Act 1964 ('JCA').

This appeal by the judgment creditor is against the decision of the learned Kamalanathan Ratnam JC (as he then was) who held on 23 May 1997 as follows:

> I would therefore agree with the learned judge in *Malaysian Soil* to this extent. I therefore allowed the appeal and set aside the order of the learned SAR dated 26 April 1996 as the act of recovery, ie the issuance of the BN on 24 January 1996 was well past the date when limitation had set in. I had earlier indicated that I would deal with s 131 in the later part of my judgment. As the issue on the amount of interest claimable is one of great importance, I am of the view that s 131 cannot be used to cure the defect which goes to the root of the BN. UMBC is therefore not entitled to recover the interest sums of RM106,863.04 and RM72,433.97. As such, the BN is invalid and has to be struck out.

At the outset of the appeal, two preliminary points were raised by the respondent. The first point was on the competency of the appeal as the

appellant had not obtained leave. After being informed by the appellant that under the practice direction of the Court of Appeal, no leave was required in bankruptcy matters, the respondent abandoned this point. The other remaining point pertained to the fact that the appeal was out of time. The learned respondent's counsel submitted that the notice of appeal was filed on 22 July 1996, whilst the decision appealed against was made on 25 June 1996. It is clear that the notice of appeal was filed more than 14 days but less than one month after the date of the judgment. The CJA and its rules provide for a one month period to file the notice of appeal whilst the Bankruptcy Act 1967 ('Bankruptcy Act') and its rules provide for a 14 day time period. The appellant clearly had complied with the CJA and its rules but not the Bankruptcy Act and its rules. Assuming that we are right in holding that the Bankruptcy Act and its rules are the applicable law, then the appellant had clearly not complied with the Act and its rules. On this matter, we are reminded of what Bowen LJ, said when he was dealing with the power of amendment in a letter's patent case of *Cropper v Smith* (1884) 26 ChD 700. At p 710 he said:

> Now it is true that under 15 & 16 Vict c83, s 41, you must give notice of an objection to the validity of the patent if you wish to raise the objection, but there is a power even in that statute for a judge at chambers to amend, and to allow you at the last moment to cure any laches or error of judgment, and what a judge could do at chambers, a judge could do in court. Moreover, every power of amendment given by the Judicature Act seems to me to be applicable to this kind of suit as well as to any other. Now, I think *it is a well established principle that the object of courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases* by deciding otherwise than in accordance with their rights. Speaking for myself and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. *Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy*, and I do not regard such amendment as a matter of favour or of grace. (Emphasis added.)

Our Federal Court in the case of *Tan Chwee Geok & Anor v Khaw Yen-Yen & Anor* [1975] 2 MLJ 188 at p 189 said:

> The Rules of the Supreme Court *are intended to facilitate, not impede, the administration of civil justice*.
>
> In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
>
> But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
>
> This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear*:
>
> 'Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and *the court ought*

> *not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case*.' (Emphasis added.)

And in the same case, Ali FJ, said (at p 192):

> The general principle, I think, is that rights of parties in an action are not to be defeated by technical objections.

In this connection, we would also like to quote what this court had said in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, at p 342, ie:

> …After all, courts exist to do justice according to the law as applied *to the substantial merits of a particular case* … (Emphasis added.)

Kaikaus J, in *Imtiaz Ahmad v Ghulam Ali PLD* 1963 SC 382 at p 400 said:

> *Any system which* by giving effect to the form and not to the substance *defeats substantive rights is defective to that extent*. The ideal must always be a system that gives to every person what is his. (Emphasis added.)

Bearing in mind the abovementioned authorities, I feel that the preliminary objection should not be allowed. The objection is indeed on a mere technicality. The notice of appeal had been filed anyway. Such procedural technical objections should not, in my view, be allowed to obstruct the process of giving justice to the deserving by going into the substantive issues of the matters before the court. Hence we overruled the preliminary objection.

My learned brother had written a separate grounds of judgment which deals with the substantive issue in the appeal. I had read his judgment and for the reasons stated therein, I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Reported by Jafisah Jaafar